

APPLYING ALTERNATE DISPUTE RESOLUTION TECHNIQUES TO RESOURCE CONSERVATION AND RECOVERY ACT REAUTHORIZATION

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ABSTRACT

The Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments in 1984, was enacted in order to manage those wastes which because of quantity, concentration, or physical, chemical or infectious characteristics may pose a significant hazard to human health or the environment. In 1992, Congress introduced two bills regarding the reauthorization of RCRA: Senate Bill 976 (S-976) and House Bill 3867 (HR-3867).

Many of the proposals introduced in S-976 and HR-3867 have been criticized by industry, environmentalist, economists, members of Congress and the EPA staff. Some of the most contentious issues include amendments regarding recycling, interstate waste transportation, industrial non-hazardous waste, groundwater, indian tribe authorization and a beverage container deposit. The objective of this paper is to outline an approach which the Clinton administration can use in order to convince the opponents and supporters of the bills to reach an agreement through Alternate Dispute Resolution (ADR).

Alternate Dispute Resolution is a negotiation process based upon principled negotiation. The method utilizes the following techniques:

- Separate the people from the problem
- Focus on interest, not positions
- Invent options for mutual gain
- Insist on using objective criteria

ADR is an efficient approach to resolve environmental policy disputes.

INTRODUCTION

This article responds to the two proposed reauthorization bills of the Resource Conservation and Recovery Act (RCRA): Senate Bill 976 (S-976) and House Bill 3867 (HR-3867). It reviews the work initiated by the 102nd Congress and recommends revisions to the congressional bills. Many of the proposals presented by Congress have been criticized by industry, environmentalists, economists, members of Congress, and the EPA staff. This article recommends specific strategies regarding the most contentious issues of S-976 and HR-3867. It identifies the opponents and supporters of the bills and outlines how the new administration can convince the parties to reach an agreement. Ways in which the Clinton administration can overcome losses of such environmental leaders as Representative Sikorski (D-Minn) and Representative Kostmayer (D-Pa) are also illustrated. Finally, recommendations for innovative approaches to address recycling and interstate waste transportation are presented.

FINANCIAL BACKGROUND

S-976, introduced by Senator Baucus (D-Mont.), received approval by the Senate Committee on the Environment and Public Works (SEP). Senator Baucus is the Environmental Protection Subcommittee Chairman. According to the congressional findings cited in S-976:

- The nation continues each year to generate increasing volumes of both hazardous and solid waste that may pose a threat to human health and the environment, if not properly managed.

- New waste management facilities are not being sited, resulting in improper waste management and long haul transportation of waste to other facilities. (1)

Although the findings illustrate the problem well, the approach introduced by Senator Baucus (D-Mont.) is not the most cost effective way to address the issues. In fact, EPA estimates S-976 could cost up to \$46 billion annually while providing little risk reduction. (2)

Don Clay, former EPA Assistant Administrator, estimates the costs of the Baucus bill as follows:

<u>Provision</u>	<u>Costs</u>
Recycling*	\$100 million - 1.5 billion
Industrial nonhazardous waste	\$1.7 billion - 2.9 billion
Groundwater protection	\$1.7 billion - 5.4 billion
Scrap tire recycling management	\$90 million - 230 billion
Medical waste	\$80 million - 140 million
Federal procurement price preference	\$21 million
Municipal incinerator ash	\$16 million
Permits for solid waste management	\$10 million
Battery recycling	\$8 million

* If these goals are interpreted as requirements, the costs would rise by an additional \$4 billion to 10 billion.

Given the cost estimate, the administration should examine the risks and benefits of S-976. The administration should use the same analysis regarding the provisions of HR-3867. The administration should also assess the chances of each of these bills being passed by the 103rd Congress. Mr. Fortuna, the director of the Hazardous Waste Treatment Council, suggests that many of the controversial issues may be settled

by letting the executive branch work them out administratively. (3) Mr. Fortuna's advice merits support.

BILL PROVISIONS

Recycling - Representative Swift (D-Wash.) and Representative Dingell (D-Mich.) sponsored recycling legislation that was adopted by the House Energy and Commerce Subcommittee on Transportation and Hazardous Materials. This bill mandates recycling levels for various industries. Mr. Clay testified before the committee against government interference in the recycling market stating, "Market based approaches, such as full-cost variable-rate pricing of solid waste disposal are preferable for encouraging cost effective waste minimization and recycling." (4) The current administration would be well advised to heed Mr. Clay's assessment and adopt his approach. However, Representative Swift (Transportation and Hazardous Materials Chairman) and Representative Dingell (Oversight and Investigations Subcommittee Chairman) will have substantial influence over other members of the House of Representatives. A joint meeting with a prominent expert, such as Mr. Banks of the World Resource Institute, to underscore the present technological limitations of recycling may provide a method of persuading Representative Swift and Representative Dingell to revise the bill.

Representative Swift acknowledges that he received a number of negative letters regarding the a controversial amendment to the House bill that would exempt the plastic and paper industry from the recycling levels. Environmentalists oppose it because it would exempt a class of material they want covered. Industry opposes it because it discriminates according to the type of commodity used in the packaging. These criticisms merit the administration's support.

The recycling provisions of S-976 also face severe opposition. Clean Water Action, the Environmental Defense Fund, and the Natural Resources Defense Council sent a joint letter to the Senate Environment and Public Works Committee urging them to vote against the bill. They focus their concerns on the industry-wide recycling goals, stating that the provision "would encourage companies to play games with the system rather than recycle." (5)

Another opponent of S-967 is Businesses for Choice in Packaging, a coalition of trade associations. The coalition stated, "The bill assumes that markets for recycled materials can be created simply by requiring industry to recover, sell and reuse material. The bill ignores technological and economic barriers to recycling packaging materials that will not be overcome just because Congress passes a mandate." (6)

EPA staff members reiterated this same point. "Mandatory recycling provisions are not the best way to stimulate markets for recycled materials since they cannot account for evolving markets, technology and consumer demand." (7) Record levels of consumer recycling are contributing to the deepest recession for most recycled materials in years. This is particularly true of the plastics industry. The drop in prices is attributed to a glut of recyclable materials that far exceed market demand for recycled plastic resins by manufacturers and a disproportionate low consumer interest for products with recycled contents. (8)

Given the economic burden on industry, any limits placed on industry should be flexible enough to give packagers various compliance options. Also, the target levels for recycling should be lowered; Senator Durenberger (R-Minn) has intro-

duced an amendment which does lower the recycling target rates. Senator Durenberger should join forces with Senator Chafee (Environmental Protection Subcommittee ranking minority member) to encourage support of this amendment.

An additional approach would be for the administration to sponsor a public awareness campaign to (1) encourage consumers to demand products made from recycled materials and (2) educate the public about the real cost of waste disposal.

One group that could educate the public is the university research community. A recent publication entitled "The Directory of Polymer Science and Engineering Programs" details recycling research at over 50 U.S. and Canadian universities. (9) The Federal Trade Commission and EPA should publicize the recent clarifications on environmental marketing claims. A coalition of industry representatives and academicians could be established to promote recycling to the consumer and to congressional representatives.

Many companies such as Environmental Recovery Systems, K-Mart, Clorox, Phillips Petroleum, and Quantum Chemical have spent considerable amounts of time, capital, personnel, and materials to develop a reliable recycled product. According to the Coalition of Northeastern Governors, voluntary reductions in packaging by industry has so far been successful. (10) The Coalition cites 29 major companies that recycle, including Scott Paper, Coors, and Proctor and Gamble. (11) The administration should publicly acknowledge these companies and encourage their efforts.

Another problem with the proposed legislation is the lack of an infrastructural plan for the redistribution of recyclable materials. The National Solid Waste Management Association (NSWMA) cited inadequate secondary markets as a deterrent to a successful recycling market. (12) A federal commission--which might include members of the NSWMA and Coalition of Northeastern Governors--could be formed to instruct the administration on such strategies as: (1) low interest loans and grants for municipalities, states, and companies willing to invest in secondary market programs, and (2) pilot projects such as the one offered by the City and County of Denver, for remanufacturing companies. Denver's economic assistance program includes below market rate financing, affordable locations on city-owned property, wage reimbursement for hiring and training programs, and business fee waivers or purchase agreements between the city and the manufacturer. (13)

The administration could also learn about the recycling programs of other countries by participating in the International Trade Exhibition & Congress on Recycling in Geneva, Switzerland. Finally, the government must set an example by endorsing a procurement preference guideline for recycled materials.

Interstate Waste Transportation - Senator Baucus has introduced an amendment to S-976 that would prohibit interstate shipments of waste. Senator Baucus and Senator Coat (R -Ind.) have introduced Senate Bill 2877 (S-2877), which Majority Leader Mitchell (D-Maine) has agreed to process separate from the RCRA legislation. However, neither S-2877 or S-976 resolves this contentious issue. Recent Supreme Court rulings have found that limits on interstate waste transportation violate the Commerce Clause of the U.S. Constitution. (14)

The administration could benefit from a direct appeal by Senator Eton (D-Neb) (Transportation Chairman) to Senator

Baucus. In his appeal, Senator Eton could emphasize the efficiency of interstate waste transport, particularly as it relates to the issue of best available technology. If this appeal fails, the administration should move to isolate this issue from the other reauthorization provisions.

A resolution of this issue requires an agreement from the key players: Senator Baucus, Senator Coats, Representative Fields (R-Tex.), Senator Metzenbaum (D-Ohio), Senator Wofford (D-Pa), and newly elected Representative Brown (D-Ohio).

Mr. Clay also voiced reservations about the House bill. HR-3865 would prohibit interstate waste transportation and cost tax payers an estimated \$23 billion to \$343 billion over the next 20 years.

Industrial Non-Hazardous Waste - An amendment to develop a more comprehensive regulatory program for industrial wastes was offered by Representative Waxman (D-Calif.) but was rejected by the House Energy and Commerce Committee (HE&CC). The committee adopted in its place language that would require states to maintain an inventory and notify the federal government of industrial waste facilities. The administration should support this substitution introduced by Representative Rick Boucher (D-Va.) and should encourage the SEP and HE&CC to introduce legislation that allows EPA to consider "practical capability" in regulating solid wastes.

Groundwater - Representative Synar's (D-Okla) amendment to HR-3867 to establish protection of beneficial uses of groundwater as a primary goal of RCRA merits support. Senator Durenberger also supported adding a policy statement on groundwater protection to S-976. Senator Durenberger (Superfund, Ocean and Water Protection Subcommittee Chairman) could influence many senators based on his expertise and control over legislation the coastal states may introduce. Senator Durenberger would be good a representative to introduce a less expensive amendment.

Battery Recycling - Battery recycling should be a low priority as research indicates that the risks from disposal of batteries are smaller than risks from recycling. The approach initiated by the Clinton administration in Arkansas endorsed recycling batteries. Placing a fee on citizens who do not return used batteries and using the money generated to develop a safer recycling process would be a beneficial approach.

Indian Tribe Authorization - S-976 will establish the criteria an Indian Tribe must meet for authorization to implement a Subtitle C program. Senator Campbell (D-Co) could oversee this task and provide educational grants to interested tribes. Senator Campbell would probably be successful in developing trust between the two adversarial organizations.

Bottle Bill - A beverage container deposit amendment was offered by Senator James Jefford (R-Vt.); the amendment was defeated due to opposition from Senator Max Baucus, who said the Senate Environment and Public Works Committee had no jurisdiction to consider a bottle bill. Senator Baucus also said the amendment would undercut the S-976 recycling provision. The motivation behind some of the congressional representative views may be questioned, in light of the fact that the U.S. Public Interest Research Group (USPIRG) said the beverage industry political action committees contributed over \$125,000 to committee members who opposed the beverage container deposit. State officials in states that approved similar legislation should be contacted to determine what factors influenced those decisions.

If the administration favors a *bottle bill*, Senator Moynihan could convince Senator Baucus of the efficiency and profits that could be gained by such a measure.

CONCLUSION

The administration should form a task force comprised of the following individuals: Senator Moynihan, Senator Mitchell, and Representative Shepherd (Senate Environmental and Public Works Subcommittee); Representative Synar and Representative Clinger (The House Energy and Commerce Subcommittee on Transportation and Hazardous Waste); a representative from the Office of Management and Budget; Mr. Wilson (Sierra Club); Mr. Karpinski (USPIRG); Mr. Greenberg (Browning Ferris Industries); and Mr. Diego (Air and Water Technologies). This task force should address the following measures not presently included in either S-976 or HR-3867:

- Revised RCRA permitting to encourage the use of innovative technologies;
- Reduction and management of oil and gas production waste and mining waste;
- Reevaluation of the mixture and derived-from rule;
- Limits on used-oil burning;
- Establishment of funds for a pollution prevention research program;
- Establishment of a committee to investigate the international approaches to waste management.

Also, the task force could prioritize the programs according to potential risks and compile written recommendations to be reviewed by Congress prior to summer recess. Mr. Eisenbud (Waste Management, Inc.) could serve as mediator for the task force. Mr. Eisenbud recently stated that RCRA reauthorization "is not dead, but it is going to need a lot of nurturing, care, and feeding."⁽¹⁵⁾

Finally, the affected parties--representatives and citizens--must participate, especially early on, in the development of regulations and policies.

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